86-69

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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QUESTION PRESENTED

Whether a state may exact a tax from an interstate motor carrier as a precondition to operation of trucks on the state's highways, resist preliminary injunctive relief on the ground that an adequate refund remedy is available, and then, when the tax is found to violate the Commerce Clause of the United States Constitution, invoke sovereign immunity as a basis for refusing to refund the taxes unconstitutionally collected.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

This petition seeks review of judgments in two class actions decided by the Vermont Supreme Court on the same day and involving essentially the same parties (the only difference is in the identity of the named plaintiffs, all of whom are petitioners in both cases because of their inclusion in the class). Petitioners herein, and their parents, subsidiaries, and affiliates, are as follows:

Petitioner American Trucking Associations, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Anderson Trucking Services, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are St. Cloud Truck Sales, K & W Trucking Co., Inc., H.E. Anderson Equipment Leasing, and R.B.J. Industries, Inc.

Petitioner Chemical Leaman Tank Lines, Inc., is a subsidiary of Chemical Leaman Corporation. Chemical Leaman Tank Lines' affiliates or subsidiaries (other than wholly owned subsidiaries) are Despatis Transport Ltd., Chemical Properties, Inc., Tank Service Company, Kipsch Hauling Company, Chemical Leaman Container Corporation, and NuBulk Services, Inc.

Petitioner G.H. Harnum, Inc., is an independent corporation whose affiliates and subsidiaries (other than wholly-owned subsidiaries) are Marco Construction, Inc., G & W Realty Trust, and K & W Realty Trust.

Petitioner International Transportation, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Schneider National, Inc.

The remaining petitioners are the unnamed class members, consisting of all interstate motor carriers primarily registered outside of the State of Vermont and sub-

ject to the payment of the fees and taxes challenged by the named petitioners.

Respondents, all parties in their capacity as officers of the State of Vermont, are William Conway, Commissioner of Motor Vehicles, Paul Philbrook, Commissioner of Public Safety, Richard Snelling, Governor, and Thomas Evslin, Secretary of the Agency of Transportation, or their successors in office.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

The American Trucking Associations, Inc. ("ATA"), *et al.*, hereby petition for a writ of certiorari to review the judgments of the Supreme Court of Vermont in these related cases, which involve essentially the same parties and the same legal issues.

OPINIONS BELOW

The opinion of the Supreme Court of Vermont in its No. 83-484 (App. A)[1] is reported at 508 A.2d 408. The opinion of the Supreme Court of Vermont in its No. 83-452 (App. C) is reported at 508 A.2d 405. An earlier opinion of the Supreme Court of Vermont in that case (App. E) is reported at 142 Vt. 17, 451 A.2d 42. The opinions, orders, and findings of the Superior Court of

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[1] References in this petition to "App. ——" are to the separately bound Appendix.

Washington County (Apps. F, G, H, I, and J) are unreported. The opinion of the United States District Court (App. K) is reported at 514 F. Supp. 1341.

JURISDICTION

The judgments of the Supreme Court of Vermont (Apps. B and D) were entered on February 21, 1986. Justice Marshall extended the time to petition for a writ of certiorari to July 21, 1986. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Commerce Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment. The relevant Vermont statutory provisions are set forth in Appendix L.

STATEMENT

This case grows out of petitioners' successful challenge to the constitutionality of two taxing schemes adopted by the State of Vermont under which trucks registered outside of Vermont were required, on pain of civil and criminal sanctions, to pay certain taxes as a precondition to the use of Vermont's highways, while Vermont-registered trucks were effectively exempted from these taxes. Although the Supreme Court of Vermont found that the taxes violated the Commerce Clause of the United States Constitution because of their discrimination against interstate commerce, it construed a state statute providing for refunds of "illegally" collected taxes as not authorizing refunds of unconstitutional taxes and held that, in the absence of statutory authorization, the doctrine of sovereign immunity barred the ordering of a refund.

A. The Statutes

In 1981, to raise additional funds to support its highway system, the Vermont legislature passed Act 87, which

established a set of taxes to be assessed against trucks registered outside the State as a precondition to their entry into Vermont. Codified at Vt. Stat. Ann. tit. 23, §§ 415, 415a, 417 (Supp. 1981), this statute required operators of non-Vermont-registered trucks weighing 18,000 pounds or more to pay a flat fee of $40 per year for each truck that would be operated in Vermont and to pay a further fee of $15 each time such a truck entered the State. In addition, a retaliatory surcharge of $10 per entry was levied if the truck was registered in a state that imposed multiple taxes on trucks using its highways. As an alternative to the foregoing taxes, a single-trip permit could be obtained for a $40 fee. None of these taxes or fees was imposed on trucks registered in Vermont. See App. at 16a.

In early 1982, following the filing by petitioners of a suit challenging the constitutionality of Act 87's entry tax system, Vermont repealed the statute. It replaced the Act 87 system with a different scheme (Act 172) under which every truck of 18,000 pounds or more was required to pay a $50 annual fuel user's license fee (the "$50 decal tax") and to display the decal received upon payment of the fee (or to pay the same $50 for a temporary or single-trip authorization). Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (Supp. 1982). While on its face this $50 decal tax applied equally to trucks registered in Vermont and to those registered in other states, Act 172 in fact kept the entire burden on out-of-state trucks by reducing by exactly $50 the annual registration fee for Vermont trucks weighing over 18,000 pounds. Vt. Stat. Ann. tit. 23, § 367(a) (Supp. 1982).

B. The Litigation

1. *ATA I.* Shortly before Act 87's entry tax system went into effect in 1981, petitioners filed suit in the United States District Court for the District of Vermont challenging the validity of the taxes under the federal Constitution on the ground that they discriminated

against interstate commerce in violation of the Commerce Clause and seeking a temporary restraining order and preliminary injunction against their collection. See App. at 82a. The district court declined to take jurisdiction of the case, invoking the Tax Injunction Act, 28 U.S.C. § 1341, and finding that a "plain, speedy and efficient remedy" was available to petitioners in the courts of Vermont. App. at 82a-87a. Its conclusion was based in part on the availability of declaratory and injunctive relief in the Vermont courts, but also rested upon the apparent power of those courts to award monetary relief (*id.* at 86a). In this connection, the district court took note of an affidavit filed by state officials indicating that refund relief would be available from the Commissioner of Motor Vehicles under Vt. Stat. Ann. tit 23, § 328 and from the Vermont courts either in reviewing the Commissioner's determination or in exercising inherent equitable powers. App. at 86a n.1.

Petitioners promptly renewed their constitutional challenge in Vermont Superior Court. App. at 17a, 80a.[2] Their request for temporary injunctive relief was denied by that court, which relied upon the availability of a state statutory refund mechanism in the event the tax statute was invalidated. The Superior Court stated (*id.* at 80a-81a):

> [N]o irreparable injury will occur to Plaintiffs should the new fee system be permitted to go into effect. Defendants' records will permit any excess fees wrongfully collected to be exactly determined and speedily refunded to specific Plaintiffs should they prevail on the merits.[3]

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[2] The proceedings in the Vermont courts challenging Act 87's taxes have been referred to by the courts and parties as *"ATA I"* and are so designated in this petition. The proceedings challenging the successor legislation (Act 172) have been and will herein be referred to as *"ATA II."*

[3] The issue presented to this Court concerns not the substantive validity of the challenged Vermont taxes—which were struck down

In expedited proceedings on the merits, the Superior Court certified a plaintiff class consisting of all interstate motor carriers whose vehicles were primarily registered in states other than Vermont but would be operated in Vermont and therefore be subject to the tax. App. at 16a & n.1. The parties stipulated that Act 87 entry taxes paid by out-of-state carriers would amount to approximately $7.5 million during fiscal 1982 (*id.* at 74a). In January 1982, the Superior Court rejected petitioners' constitutional challenges to the entry taxes and dismissed the complaint (*id.* at 70a-79a).

Petitioners appealed to the Supreme Court of Vermont. Because the taxes levied by Act 87 had been repealed by the time it rendered its decision, thereby mooting the claims for declaratory and injunctive relief, the court described the "sole issue" in the appeal to be whether petitioners were entitled to refunds for taxes collected under Act 87 "on the ground that the taxes were unconstitutionally exacted" (App. at 27a). The court then proceeded to clarify the legal standard for determining the validity of the taxes, and remanded the case for further findings as to the extent of actual discrimination against interstate commerce (*id.* at 27a-30a).

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as violative of the Commerce Clause by the Supreme Court of Vermont—but petitioners' right under the federal Constitution to obtain the return of taxes that were unconstitutionally exacted from them. As the lawsuits were originally filed, the claim of entitlement to a refund was made as an integral part of the constitutional attack on the validity of the taxes. Although petitioners did not separately argue that the Constitution requires a refund remedy for taxes collected in violation of the Commerce Clause, it appeared unnecessary to do so. As is evident from the above ruling of the Superior Court and the discussion in the rest of the Statement, neither the defendant state officers nor the federal or state courts questioned (until the litigation had proceeded for many years and tens of millions of dollars in taxes had been collected) that a finding of unconstitutionality would lead to a refund. Thus, the sub-issue of remedy did not emerge as a distinct federal question (in a case concerned exclusively with federal constitutional rights) until the Supreme Court of Vermont rendered the decisions here challenged.

On remand, the Superior Court again upheld the taxes (App. at 65a-69a), and petitioners again appealed. This time the Supreme Court of Vermont reached the merits and found the entry tax plan violative of the Commerce Clause because of its facial discrimination against interstate commerce (App. C). The court explained (*id.* at 19a):

> Under Act 87 foreign-registered truckers must pay the fees while Vermont-registered truckers and their customers are protected from the impact of the tax. Members of the plaintiff class are at a competitive disadvantage.

2. *ATA II.* Act 172, repealing the entry tax system and substituting the $50 decal tax, was enacted in early 1982 with an effective date for the new tax of December 1, 1982. In June 1982, well before this effective date, petitioners filed a new class action in Vermont Superior Court challenging the decal tax on essentially the same federal constitutional grounds as the Act 87 entry tax had previously been attacked. The complaint alleged that the nominally even-handed tax in fact had a drastically disparate impact on Vermont and non-Vermont trucks because it was coupled with a $50 reduction in Vermont truck registration fees, which eliminated any burden on Vermont truckers. The complaint therefore charged that Act 172 discriminated against interstate commerce in violation of the Commerce Clause and that petitioners were entitled to declaratory and injunctive relief and to refunds of all decal tax payments that might be made during the course of the litigation. The parties entered into stipulations covering many of the pertinent facts; as to the subject of refund relief, the parties agreed as follows (App. at 31a):

> That in the event the Act is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully or illegally ob-

> tained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. § 3020 . . . , 23 V.S.A. § 328 or in any other manner ordered by such Court.

The Superior Court found that the decal tax scheme violated the Commerce Clause, both because of its facial discrimination against interstate commerce and because it resulted in per mile costs for out-of-state carriers many times greater than those for Vermont carriers (App. at 57a-60a). Nevertheless, the court concluded that it lacked power at that juncture to order refunds of taxes unconstitutionally exacted (*id.* at 31a-32a). This ruling reflected the court's view of the limitations imposed on its remedial powers by the Vermont declaratory judgment statute, but it was coupled with a recognition of petitioners' right to seek refunds from the Vermont Commissioner of Motor Vehicles under Vt. Stat. Ann. tit. 23, § 3020(b), subject to possible judicial review of the action on such refund applications. App. at 32a.

On February 21, 1986, concurrently with its decision invalidating Act 87's entry tax, the Supreme Court of Vermont struck down Act 172's decal tax as unconstitutionally discriminatory (App. A). Relying upon this Court's decisions in *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp.* v. *Tully*, 104 S. Ct. 1856 (1984), the court concluded that the result of the offsetting reduction in registration fees for Vermont trucks was a discrimination against interstate commerce resulting in "a direct commercial advantage to Vermont truckers." App. at 7a.

3. *The Refund Decision.* In both cases, despite its findings of unlawful discrimination against interstate commerce, the Supreme Court of Vermont refused to order refunds of the taxes exacted from petitioners during the litigation in violation of the Commerce Clause. App. at 9a-12a, 21a. The court based its decision on sovereign immunity, noting that the State could not be

sued under Vermont law for injuries suffered as the result of performance of governmental functions, which included imposition and collection of taxes, in the absence of a state statute authorizing the suit.

The court then turned to the question whether statutory authority existed for a suit seeking a tax refund. It examined (App. at 11a) the refund statute that was passed as part of Act 172 (Vt. Stat. Ann. tit. 23, § 3020(b)). That statute provides in pertinent part that if a tax "has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited . . . [or] refunded." This enactment, the court concluded, is concerned with "redressing errors in the enforcement or implementation of the diesel fuel tax [and] merely provides for a refund mechanism if errors are made in determining what tax is imposed" (App. at 12a). The court held that Section 3020(b) does not authorize refunds of payments of illegal taxes, stressing that the legislature had not appropriated monies to be used for refund purposes were the statute to be invalidated.

REASONS FOR GRANTING THE PETITION

I. THE VERMONT SUPREME COURT'S DECISION RAISES A FREQUENTLY RECURRING CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE TO INTERSTATE MOTOR CARRIAGE IN THE UNITED STATES.

The motor carrier industry pays billions of dollars annually in state highway taxes. *See* Federal Highway Administration, Department of Transportation, *Highway Statistics 1984*, at 66. Increasingly over the past several years, states have modified their systems for levying highway-related taxes, fees, or charges to shift the burden of payment away from their own domestic carriers and onto operators of out-of-state vehicles engaged in interstate

commerce. Consequently, over the past five years, state courts have frequently found themselves obliged, in reliance on this Court's decisions construing the Commerce Clause of the United States Constitution, to invalidate a number of state highway imposts on the ground of impermissible discrimination against interstate commerce. *See American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623 (Me. 1981); *Huie* v. *Private Truck Council of America, Inc.*, 466 N.W.2d 435 (Ind. 1984); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me. 1986), *cert. denied*, —— U.S. ——, 106 S. Ct. 1997 (1986); *Private Truck Council of America, Inc.* v. *Louisiana*, No. 289, 481, [2 La.] St. Tax Rep. (CCH) ¶ 800-890 (La. D. Ct., 19th J.D., DIV. H, June 20, 1986).

A substantial number of additional cases are now pending that challenge such discriminatory state highway tax statutes.[4] These pending but unresolved cases involve 10

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[4] *E.g.*, *ATA* v. *Conway*, No. S-95-86 WnC (Vt. Super. Ct., Washington Cty.) (challenging retaliatory tax; order entered April 14, 1986, for escrow of tax payments of approximately $650,000 annually); *ATA* v. *Conway*, No. S-147-86 WnC, [Vt.] St. Tax Rep. (CCH) ¶ 20-263 (Vt. Super. Ct., Washington Cty.) (challenging revised $50 decal tax; order entered May 29, 1986, for escrow of tax payments of approximately $6 million annually); *ATA* v. *Gray*, 709 S.W.2d 410 (Ark. 1986) (upholding constitutionality of 5 cents per mile or $175 per year tax raising approximately $25 million annually) (notice of appeal to U.S. Sup. Ct. filed June 17, 1986); *ATA* v. *Kentucky*, No. 86-CI-0464 (Ky. Cir. Ct., Franklin Cty.) ($150-$200 flat tax per truck, raising approximately $72 million annually); *ATA* v. *Kline*, No. 07-14-1667-85 MVT (N.J. Tax Ct.) ($25 per truck tax raising approximately $12 million annually); *ATA* v. *Scheiner*, 509 A.2d 838 (Pa. 1986) (upholding constitutionality of $25 per truck tax raising approximately $10 million annually and of successor tax of $36 per axle raising approximately $62 million annually) (notices of appeal to U.S. Sup. Ct. filed June 16, 1986); *Owner-Operators Independent Drivers Assoc.* v. *New Hampshire*, No. 85-E-317 (N.H. Super. Ct., Merrimack Cty.) ($20 per truck tax raising approximately $2.1 million annually); *Owner-Operators Independent Drivers Assoc.* v. *Kentucky*, No. 86-CI-0149

states and an estimated $193 million in annual highway tax liabilities, and affect the efficiency and competitive capabilities of tens of thousands of interstate motor carriers throughout the country.

Despite the prevalence of discriminatory highway tax legislation injurious to interstate motor carriers and to the policies of the Commerce Clause, state courts have manifested a growing reluctance to order restitution of taxes collected in violation of the federal Constitution. In 1986 alone, the motor carrier industry successfully challenged the constitutionality of highway taxes in three different states but was denied a tax refund in every case. In each instance a seemingly clear refund statute was given a strained and narrow interpretation in order to remove the challenged tax from its coverage.

In *Continental Trailways, Inc.* v. *Director, Division of Motor Vehicles*, 509 A.2d 769 (N.J. 1986), for example, a bus excise tax was found to discriminate on its face against interstate commerce. Although the New Jersey Supreme Court upheld the lower courts' finding of unconstitutionality, it reversed their grant of a refund.

(Ky. Cir. Ct., Franklin Cty.) ($25 per truck registration fee raising $300,000 annually); *Private Truck Council of America, Inc.* v. *Georgia*, No. D15385 (Ga. Super. Ct., Fulton Cty.) (retaliatory tax raising approximately $3.5 million annually); *Private Truck Council of America, Inc.* v. *Florida Dep't of Revenue*, No. 85-368 (Fla. Cir. Ct., Leon Cty.) (retaliatory tax raising approximately $600,000 annually); *Private Truck Council of America, Inc.* v. *Nebraska*, Doc. No. 841 (Neb. D. Ct., Lancaster Cty.) (retaliatory tax raising approximately $1 million annually); *Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-08A (N.H., argued June 10, 1986) (retaliatory tax raising approximately $200,000 annually); *Private Truck Council of America, Inc.* v. *New Jersey*, No. L85-1261 (N.J. Super. Ct., Mercer Cty., Oct. 4, 1985) (appeal pending) (upholding retaliatory tax raising approximately $4.5 million annually); *Private Truck Council of America, Inc.* v. *Oklahoma*, No. CH-84-9902 (Okla. D. Ct., Oklahoma Cty.) (retaliatory tax raising approximately $3.5 million annually).

The court determined that the State Tax Uniform Procedure Law, which provided expressly for tax refunds, was not applicable to the bus excise tax because the tax was not "collectible by the state tax commissioner." Two dissenting Justices pointed out that there was "no reason to distinguish among taxes paid to the State of New Jersey on the basis of which division of state government is the payee."

Similarly, in *Private Truck Council of America, Inc.* v. *Secretary of State, supra*, the Maine Supreme Court relied on a narrow construction of the state refund statute to deny a refund of taxes collected in violation of the Commerce Clause. Even though the refund statute (Me. Rev. Stat. Ann. tit. 36, § 152 (Supp. 1985-1986)) expressly stated that taxpayers could "pay any tax . . . without forfeiting any right to apply for a refund" and that no such tax "need be paid . . . under protest or under duress to entitle the taxpayer to apply for a refund," the court gave a crabbed construction to this broad language and ruled that the injured motor carriers should "not [be] given the benefit of the refund statute." 503 A.2d at 219-220.[5]

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[5] Justices Brennan, White, and O'Connor would have granted certiorari in this case to address a related tax refund issue. *See* 106 S.Ct. 1997. There was, however, a considerably less compelling need for review in that instance than in the present case. Because of an escrow fund that had been established when suit was filed in that case, the taxpayers were assured of receiving the lion's share of taxes wrongfully exacted. *See* 85-1423 Pet. App. 1a-3a. Here, by contrast, petitioners were refused preliminary relief before the tax went into effect and therefore were forced to pay into the State's treasury about $25 million of unlawfully exacted taxes that they cannot recover unless this Court grants review. Moreover, the petition in *Private Truck Council* principally emphasized a different point, addressing the refund question in two pages that failed to describe the substantial national impact of the growing tide of decisions of this character. As we demonstrate in this petition, the question is now ripe for review by this Court.

The Vermont Supreme Court's decisions in the instant cases represent an even more strained and illogical construction of a state refund statute. The relevant portion of Vt. Stat. Ann. tit. 23, § 3020(b) provides, without limitation, for a refund of any taxes "illegally or erroneously collected or computed." Nonetheless, the Vermont Supreme Court excluded the taxes at issue in this case from coverage of the refund statute by holding that the statute "merely provide[s] for a refund mechanism if errors are made in determining what tax is imposed." App. at 12a. The court concluded that an unconstitutional tax was not an "illegal" tax within the meaning of the refund statute and that sovereign immunity barred any refund.[6]

Although state courts have the final word on the meaning of state refund legislation, they do not have the final word on the requirements of the federal Constitution. As we demonstrate in this petition, past decisions of this Court construing the Commerce Clause and the Due Process Clause require a refund of taxes collected by the states in violation of the federal Constitution. The decision of the Vermont Supreme Court, foreclosing petitioners' right to a refund of millions of dollars of taxes exacted in violation of the Commerce Clause, conflicts with those decisions and should be reversed.

The need to resolve this conflict is compelling. Decisions such as that of the Vermont Supreme Court effec-

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[6] State resistance to restitution of taxes exacted in violation of the federal Constitution is not confined to the motor carrier industry. For example, although this Court decided that a Hawaii state tax discriminated against interstate commerce over two years ago in *Bacchus Imports Ltd.* v. *Dias*, 468 U.S. 263 (1984), the taxpayers still have not obtained any relief and are now mired in a protracted factual hearing before the Hawaii Tax Court. Other recent decisions from the state courts have blunted the taxpayers' right to a refund by applying this Court's decisions only on a prospective basis. *See, e.g., First of McAlester Corp.* v. *Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985); *Metropolitan Life Ins. Co.* v. *Commissioner of Insurance*, 373 N.W.2d 399 (N.D. 1985).

tively strip away the Commerce Clause rights of interstate motor carriers. Those carriers suffer years of discriminatory treatment with associated competitive disadvantages. Unless they are able to obtain refunds of taxes collected in violation of the Constitution, firms subject to discrimination are not restored to the equality with in-state businesses that the Commerce Clause demands. And without a refund requirement, the power of the Commerce Clause to deter the enactment of a series of discriminatory levies is greatly diminished, as the present case illustrates.[7] If years of costly litigation result in literally no benefit for taxpayers, they "will have little incentive to seek vindication of" their Commerce Clause rights and the states will be left free to engage in whatever forms of economic protectionism they wish, to the detriment of the important policies secured by the United States Constitution. *Owen* v. *City of Independence*, 445 U.S. 622, 651 & n.33 (1980).[8]

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[7] The Vermont Supreme Court's decision striking down the $50 decal tax at issue in this case went into effect on March 3, 1986. On April 18, 1986, the Vermont General Assembly reenacted the $50 decal tax, making it retroactive to March 3, 1986 (Adj. Sess.), No. 124 §§ 10-13 ("Act 124"), *amending and reenacting* Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (App., at 90a, 96a, 98a). Act 124 repealed Act 172's corresponding $50 reduction in Vermont truck registration fees. In other respects, however, Act 124 fully reinstated the $50 decal tax, notwithstanding the Vermont Superior Court's 1983 holding in *ATA II* that the decal tax unlawfully discriminated against interstate commerce apart from the $50 reduction in registration fees (App. at 59a). *American Trucking Associations, Inc.* v. *Conway*, No. S-147-86 WnC, [Vt.] St. Tax Rep. (CCH) ¶ 200-263 at 10,337 (Vt. Super. Ct. May 29, 1986). Petitioners promptly filed a new constitutional challenge to the reenacted tax in Vermont Superior Court. Relying on its 1983 decision in *ATA II*, the court found that "[n]ot only are Plaintiffs likely to succeed, they will succeed at the trial level unless, for some miraculous circumstance, the $50 use [decal] tax today does not impact in a discriminatory fashion as it did in *ATA II*." *Id.* at 10,338.

[8] A grant of certiorari in this case would not only bring before this Court an important question concerning the power of the states

II. THE VERMONT SUPREME COURT'S DECISION ERRONEOUSLY IMPAIRS RIGHTS UNDER THE COMMERCE CLAUSE AND CONFLICTS WITH THIS COURT'S HOLDINGS REQUIRING RESTITUTION OF UNCONSTITUTIONALLY EXACTED TAXES.

A. A Refund of Taxes Unconstitutionally Assessed Is Necessary to Effectuate the Commerce Clause's Prohibition of Discrimination Against Interstate Commerce.

"The very purpose of the Commerce Clause [is] to create an area of free trade among the several states." *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). In the state tax field, "the prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purposes of the Clause." *Boston*

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to thwart federal constitutional rights by withholding any remedy for their violation and resolve an issue that is increasingly becoming the focus of much state court litigation, but it would also forestall a tendency on the part of aggrieved state taxpayers to take their disputes with the states to federal court. Congress enacted the Tax Injunction Act, 28 U.S.C. § 1341, to protect the states from federal court intervention in controversies regarding their tax systems, but only where the taxpayer has a "plain, speedy, and efficient remedy" in the state courts. The availability of adequate state refund procedures is central to the formulation. *See California* v. *Grace Brethren Church*, 457 U.S. 393, 417 (1982); *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 303 (1952) (state refund remedy held inadequate because it applied to less than 15% of the total taxes in controversy); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 300-301 (1943). When states such as Vermont deny refund relief to taxpayers injured by unconstitutional tax statutes, the federal courts will inevitably be importuned with increasing numbers of requests for injunctive relief against state tax officials, a result that can be avoided if the Court grants review here and reaffirms the longstanding principle that the states are obligated to provide a means of recouping unconstitutionally exacted taxes.

Stock Exchange v. *State Tax Commission*, 429 U.S. 318, 329 (1977). A state must structure its taxes so as to put interstate "commerce actually on a plane of equality with local trade in local taxation." *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946).

When states have violated this basic principle of equal, non-discriminatory treatment, this Court has routinely struck down the tax under the Commerce Clause. The remedy in these cases has often been a refund or abatement of the discriminatory tax. This remedy responds directly to the evil caused by the constitutional violation by reestablishing equality between interstate and local commerce. Thus, in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963), the Court sustained a refund claim under the Commerce Clause for a sales and use tax scheme that discriminated against products assembled out-of-state. The refund equalized the sales and use tax burden on equipment assembled inside and outside the state. In *Best & Co.* v. *Maxwell*, 311 U.S. 454 (1940), the Court sustained a refund claim under the Commerce Clause for a privilege tax that discriminated against non-resident merchants. The refund equalized the privilege tax burden on local and out-of-state merchants. And in *I. M. Darnell & Son Co.* v. *City of Memphis*, 208 U.S. 113 (1908), the Court sustained a refund claim under the Commerce Clause for a property tax that discriminated against out-of-state property. Again, the refund equalized the property tax burden on local and out-of-state property.

Ordering refunds of a state tax exacted in violation of the Commerce Clause is, in fact, the *only* remedy that can realistically maintain the equality between interstate and local commerce that the Constitution demands. Equitable relief prior to payment of an unconstitutional tax would be effective, but it is rarely available because of the Tax Injunction Act, 28 U.S.C. § 1341, which generally

prohibits the federal district courts from enjoining, suspending or restraining the assessment, levy, or collection of any state tax. Indeed, this case illustrates the difficulty of obtaining preliminary injunctive relief. The federal district court denied ATA's motion for a temporary restraining order and preliminary injunction in *ATA I* partly on the ground that it believed Vermont law provided a refund remedy and that it therefore lacked jurisdiction under the Tax Injunction Act. App. at 86a & n.1. ATA then went to state court, which also denied preliminary injunctive relief, similarly relying on the purported availability of a refund remedy. *Id.* at 80a-81a.

Thus, a refund of taxes assessed unconstitutionally is necessary to restore out-of-state businesses to a "plane of equality" with local businesses. As Justice Holmes wrote for the Court in *Atchison, T & S.F.R.R.* v. *O'Connor*, 223 U.S. 280, 285 (1912), "[i]t is reasonable that a man who denies the legality of a tax should have a clear and certain remedy." In view of the inadequacies of injunctive relief in the state tax area, however, the Court concluded in *Atchison* that "an action at law to recover back what [the taxpayer] has paid is the [only] alternative left." *Ibid.* Unless states are required to respect that alternative, the purposes of the Commerce Clause would be frustrated, and the disparate burdens imposed on interstate commerce would continue to have economic and anticompetitive effects. Cf. *Bazemore* v. *Friday*, 54 U.S.L.W. 4972 (U.S. July 1, 1986).

Furthermore, requiring refunds of taxes imposed in violation of the Commerce Clause is essential to deterring states from repeatedly enacting unconstitutional levies. If a state were permitted to retain the benefits of a discriminatory exaction, it would have little incentive to refrain from enacting a slightly different but still discriminatory tax and collecting the new tax payments with impunity during the several additional years it might

take taxpayers to obtain a final judgment striking down the new tax. This cycle of governmental lawlessness and long, costly, futile litigation would nullify federal constitutional protections and effectively negate the Commerce Clause's prohibition of discriminatory state taxes.

Again, this case confirms that these fears are more than mere speculation. One has only to look at Vermont's highway tax activities over the past five years to confirm the reality of the problem. In the face of the Vermont Supreme Court's clear ruling in *ATA I*, Vermont, comforted with the knowledge that it would not have to refund any unconstitutional tax receipts, continued to enforce and defend a revised retaliatory tax although it was quite similar to the one found to be unconstitutional in *ATA I*. Likewise, notwithstanding the Vermont Supreme Court's recent *ATA II* decision declaring unconstitutional the State's $50 decal tax on trucks, the Vermont legislature reenacted the tax in April 1986, thus necessitating yet another lawsuit.

B. This Court Has Recognized That the Fourteenth Amendment Requires Refunds of Unconstitutional Taxes Even Where No State Refund Statute Exists.

The considerations summarized above have led this Court to hold repeatedly that a state must refund taxes exacted in violation of the Constitution. In *Ward v. Love County*, 253 U.S. 17, 24 (1920), for example, the Court held that failure to refund "unlawful taxes" paid "under compulsion" would be "arbitrar[il]y and without due process of law [and] [o]f course would be in contravention of the Fourteenth Amendment." The Court further held in *Ward* that "no statutory authority was essential to enable or require" the refund of a tax payment that was "not voluntary but made under compulsion." *Ibid.* The Court reiterated this principle in *Car-*

penter v. *Shaw*, 280 U.S. 363, 369 (1930), stating that a "denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *See also Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *United States* v. *State Tax Commission*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981) ("[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of the tax in the first instance"); *Gallagher* v. *Evans*, 536 F.2d 899, 900-901 (10th Cir. 1976).

The ruling of the Vermont Supreme Court cannot be squared with these decisions. As the court below correctly held (App., at 7a, 19a), the challenged Vermont taxes imposed on interstate motor carriers clearly discriminated against interstate commerce and thus ran afoul of the Commerce Clause. Moreover, there can be little doubt that those taxes were paid "under compulsion," as that term has been construed in previous cases. In *Ward* v. *Love County*, *supra*, the Court relied on *Atchison, T & S.F.R.R. Co.* v. *O'Connor*, 223 U.S. at 286, which had defined compulsion in terms of "implied duress" and "serious disadvantage[s]" to those who refuse to pay an unconstitutional tax.[9] Thus, in *Gaar, Scott & Co.* v. *Shannon*, 223 U.S. 468, 471 (1912), the Court held that payment of an illegal tax in order to avoid a penalty of 25% and loss of a license was "not voluntary but compulsory, and may be recovered back." Similarly, in *Union Pacific Railroad Co.* v. *Public Service Commission*, 248 U.S. 67, 70 (1918), the Court concluded that a fee charged by a state for a certificate authorizing a carrier to issue bonds had been paid "under duress" because the certificate was a "commercial necessity" and the threat-

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[9] This Court, in *United States* v. *State Tax Commission*, 412 U.S. 363, 368 n.11 (1973), recently cited with approval the test of business compulsion developed in *Ward* and *Atchison*.

ened penalties for nonpayment were worse than the fee itself. And in *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 327 (1942), the Court stated that "[t]he courts generally regard the dilemma of the taxpayer who must either pay the taxes or incur serious business losses as a species of duress."

Under this standard, the tax payments in the present cases were plainly made involuntarily and under compulsion or duress. In order to conduct their interstate business operations, motor carriers were required to utilize Vermont's roads. Vermont conditioned the use of its roads on the payment of illegal, discriminatory taxes. Motor carriers were thus faced with either (i) paying the tax under protest; (ii) totally discontinuing their interstate business in and through Vermont; or (iii) continuing their business while refusing to pay the tax, thereby subjecting themselves to the disruption, inconvenience, and expense attendant to Vermont's enforcement activities. Associated with those enforcement activities were heavy civil and criminal penalties for noncompliance.

Failure to comply with the entry fee tax system would have subjected motor carriers to two separate penalties for each unreported entry into the State. Vt. Stat. Ann. tit. 23, § 421 (Supp. 1985) levied fines of $100 to $250 for a first violation and $250 to $500 or 30 days' imprisonment for every subsequent violation of the $40 annual permit requirement of Section 415. Additionally, Vt. Stat. Ann. tit. 23, § 417(b) (Supp. 1982), *as amended by* 1981, No. 87, § 19, imposed a $40 fine for every violation of the per entry charge of Section 417(a). Violation of the $50 decal tax provisions would have subjected motor carriers to the penalty provisions of Vt. Stat. Ann. tit. 23, § 421 (Supp. 1985), as stated above, as well as the penalties provided by Vt. Stat. Ann. tit. 23, § 3024 (Supp. 1985), which imposed a fine of up to $5000 or one year imprisonment under Section 3024(a) and a $500 to $2000 fine under Section 3024(c).

Since individual motor carriers send trucks into Vermont hundreds or even thousands of times per year, these penalties for noncompliance could have amounted to hundreds of thousands of dollars. Payment of unconstitutional taxes against the threat of such heavy monetary sanctions or even imprisonment cannot be considered voluntary. Here, it is little wonder that motor carriers chose to pay the unconstitutional taxes under protest rather than jeopardize their business interests by incurring the "serious disadvantage" and "serious business losses" associated with non-payment. *See Union Pacific Railroad Co.* v. *Public Service Commission of Missouri*, 248 U.S. 67, 70 (1918) ("It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress.").

C. The Refund of Unconstitutional Taxes Required By the Constitution Is Not Barred By Principles of Sovereign Immunity.

As we have shown, because the unconstitutional retaliatory tax payments were exacted involuntarily and under compulsion or duress, they must be refunded. The Vermont Supreme Court nonetheless refused to allow this remedy by relying on the doctrine of sovereign immunity. The court below stated that "[t]his action for a tax refund is a suit against the state, and therefore, is barred by sovereign immunity unless the state has waived its immunity." App. 11a. The court then rejected the argument that the Vermont tax refund statute constitutes a waiver of sovereign immunity by construing that statute to apply only where "errors are made in determining what tax is imposed" and not where "amounts [are] paid to the state under a statute later declared invalid." *Id.* at 12a.

The Vermont Supreme Court's application of sovereign immunity is misguided for a number of reasons. First, this Court already has determined that, in the context of

unconstitutional taxes, the Constitution *requires* repayment, notwithstanding state rules to the contrary. Second, the Eleventh Amendment cases cited by the Vermont Supreme Court do not bolster its sovereign immunity holding. In fact, the Eleventh Amendment has nothing to do with this case. It merely prohibits *federal* courts from entertaining a suit against a state without its consent; by its terms the Amendment has no application to *state* court jurisdiction or remedies. Indeed, the absence of a federal forum only emphasizes the need for state courts to provide effective relief for constitutional violations. *See* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in their Own Courts For Constitutional Violations*, 69 Calif. L. Rev. 189, 315 (1981):

> Under current doctrine, the federal courts are powerless to give adequate relief. But the state courts are not equally powerless. On the contrary, the supremacy clause tells them they must give these claimants a hearing on their claim to a constitutional remedy against the state. And in that hearing, state judges must cast aside state law, including sovereign immunity, if it is inconsistent with the commands of the Constitution.

See also General Oil Co. v. *Crain*, 209 U.S. 211, 226 (1908), holding, in a case challenging state taxes under the Commerce Clause, that if redress in federal court is barred by the Eleventh Amendment, and if redress "may be forbidden by a State [in] its Courts," it "must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution."

Moreover, notions of sovereign immunity have little relevance to suits for a refund of money or property unconstitutionally exacted. The doctrine of sovereign immunity is intended to safeguard the treasury against unauthorized and unexpected expenditures that might threaten the public fisc. *See FCIC* v. *Merrill*, 332 U.S.

380, 385 (1947). Whatever the force of this concern in a suit for damages, it is quite beside the point in a claim for restitution. As Professor Wolcher has observed, "a state has little legitimate reason to object to a constitutionally implied remedy in state court in cases where the plaintiffs seek the return of property or the refund of money that the state has unconstitutionally taken from them." Wolcher, *supra*, 69 Calif. L. Rev. at 309. In that situation, the state "is only being asked to pay back money which the plaintiff claims it had no right to collect in the first place. The action in substance represents a claim of unjust enrichment against the state that does not threaten the integrity of its general revenues." *Id.* at 310. *See Ward* v. *Love County*, 253 U.S. at 24; *Poindexter* v. *Greenhow*, 114 U.S. 270, 286, 296-297 (1885) (holding that state sovereign immunity is overridden by the Contract Clause and ordering restitution of property held by the state).

In these circumstances, it is wholly inappropriate, and wholly incompatible with the Commerce and Supremacy Clauses, to allow a state to impose a tax that blatantly discriminates against interstate commerce in violation of the Constitution and then to interpose state law defenses as a reason for refusing to refund the tax and thereby to eliminate the constitutional violation. This Court should grant review to consider the correctness of this anomalous result, ordained by the Vermont Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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